

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	MB Docket No. 04-233
Broadcast Localism)	

**REPLY COMMENTS OF
THE MONTANA BROADCASTERS ASSOCIATION**

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EXECUTIVE SUMMARY

The voluminous record in this proceeding confirms the continuing validity of the Commission's long-standing deregulatory policies applicable to broadcast radio and television stations. Broadcasters across the nation are demonstrating a high level of community involvement and responsiveness, attributable not only to competitive pressures and economic incentives, but to their own sense of public service as well. The absence of rigid national programming rules and standards is helping to ensure that communities throughout America enjoy the diverse and unique programs that best suit their interests and needs.

The record demonstrates, furthermore, that broadcasters are striking the right balance in providing political coverage. While several advocacy organizations urge the Commission to impose new content regulations and overhaul existing regulatory requirements to help foster political discourse, neither the facts nor the law support their arguments. The current communications environment - which includes cable, satellite, and Internet offerings in addition to broadcast and print media - already provides the vigorous forum for democratic discourse that these parties seek. Requiring broadcast stations to air additional political coverage does not serve the interests and needs of a public that overwhelmingly considers broadcast political coverage to be either "about right" or "too much."

In allocating airtime, broadcasters must be responsive to the community, not the specific interests of advocacy groups or individuals. Despite the apparent frustration of aspiring musicians or performers with what they perceive as limited access to broadcast facilities, it appears that most audience members are satisfied with the mix of formats and content being broadcast on commercial stations today. It is both a business and legal imperative for

broadcasters to be responsive to their communities. The record demonstrates that stations will support local musicians or performers when their communities do, too.

Under the *State Farm* line of cases, the Commission needs a "reasoned analysis" before it may re-regulate broadcast stations to achieve its localism policy goals. Significantly, those who urge the Commission to depart from its deregulatory policies appear unable or unwilling to offer even a cursory legal analysis to support their recommendations. Their silence should be construed as implicit concessions that their proposals to re-regulate, establish new rules or standards, or overhaul existing procedures and processes are legally untenable.

Finally, it is axiomatic that the Commission may act only pursuant to the authority that Congress has delegated to it. An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress. Because Congress has chosen to occupy the field of license renewals, the Commission impermissibly exceeds its delegated authority if it acts to "strengthen" the license renewal process beyond that which Congress provided.

The Commission should take no further action in response to its Notice of Inquiry. The record in this proceeding demonstrates that its current deregulatory approach, which is consistent with Congress' vision and mandate, is the most efficient and expeditious approach to fostering localism and achieving public policy goals.

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The Montana Broadcasters Association (hereinafter "the Association"), by its undersigned attorneys, hereby submits these reply comments in response to the initial comments filed in the above-captioned proceeding.¹

To date, the Commission has compiled a voluminous record in its localism proceeding. In addition to testimony and input received at public hearings held nationwide, well over 81,500 written comments have been filed with the Commission since the July 1, 2004 release of its Notice of Inquiry ("NOI"). Although the Association was unable to review the entire record, it appears that the vast majority of commenters, including apparently thousands of individuals supporting their favorite broadcasters, urge the Commission to take no action that would change the *status quo*. Ultimately, these comments reveal that there is no localism "problem" to be fixed. While certain groups seek increased access to broadcast stations to promote their social or personal agendas, the record establishes that communities across the country are currently well-served by their local broadcast stations. The Commission's continuing reliance on market

¹ In the Matter of Broadcast Localism, *Notice of Inquiry*, MB Docket No. 04-233, FCC 04-129 (rel. July 1, 2004) (hereinafter "NOI"). The Association filed its initial comments jointly with the Arizona Broadcasters Association and the Kentucky Broadcasters Association.

forces to achieve its localism objectives, which is also consistent with congressional direction, is well-placed.

Discussion

1. The deregulated environment enhances broadcasters' responsiveness to their communities.

The concept of localism reflects a public policy mandate that broadcast stations provide service to and for the communities in which they operate. Though rooted historically in geographic considerations,² the concept is necessarily a flexible one. Among other things, the concept of localism must be sufficiently flexible to accommodate communities across the nation, regardless of factors such as size, location, or make-up.³

The elasticity inherent in the concept of localism makes it extraordinarily difficult to establish definitions or guidelines that can be applicable nationwide yet not extinguish a community's individuality.⁴ Further complicating the Commission's task in promoting localism are the constitutional considerations to which the Commission must be sensitive. As the Supreme Court has recognized, "balancing the various First Amendment interests involved in the broadcast media . . . is a task of great delicacy and difficulty."⁵

² See e.g., Comments of Collegiate Broadcasters, Inc. at 4 (November 1, 2004).

³ Arguably, the concept of localism must be sufficiently flexible to accommodate evolving definitions of community as well. Evolving types of community may include what appear to be thousands of supportive K-Love listeners who, although geographically dispersed, have filed e-mail comments attesting to the extent to which K-Love serves their needs and interests.

⁴ See e.g., Comments of Citadel Broadcasting Company at 1-2 (November 1, 2004) (hereinafter "Citadel") (discussing the Commission's rejection, in *Deregulation of Radio*, 84 F.C.C. 2d 968 at ¶¶ 58-68 (1981) (hereinafter *Radio Deregulation Order*), of "regulations that straight-jacket all stations into the same mold.").

⁵ *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 102, 36 L. Ed. 2d 772, 93 S. Ct. 2080 (1973).

The record demonstrates that broadcasters strive to comply with their localism obligations.⁶ To determine local needs and interests, they solicit community input using a wide variety of mechanisms; many use multiple means, including phone lines, websites, focus groups, town meetings, and community ascertainment seminars. Active participation in civic, educational and charitable groups helps station executives and representatives keep their fingers on the pulse of the community. Programming geared to issues of local interest, emergency alerts, and public service announcements are among the many ways broadcast stations respond to the needs and interests they identify.

As is demonstrated in the examples of service provided in Attachment A hereto, the record is replete with evidence that documents Montana broadcasters' distinguished record of service to their local communities. The record evidence confirms that broadcast stations, which are accountable to both the Commission and the communities in which they operate, are best situated to identify community needs and desires and to respond promptly to them.

Perhaps as a result of their close ties to their communities, broadcast stations and their associations are attuned to the complexity inherent in the concept of localism. They agree that the Commission faces serious difficulties in even defining what constitutes the "local programming" that broadcasters should air to serve the needs and interests of their communities.

⁶ See generally Comments of the Alaska Broadcasters Association (November 1, 2004) (hereinafter "AL-BA"); CCBA; Citadel; Comments of Delmarva Broadcasting Company (November 1, 2004); Comments of Joint Broadcasters (November 1, 2004); Comments of Mississippi Association of Broadcasters (November 1, 2004); Comments of Named State Broadcasters Associations (November 1, 2004) (hereinafter "Named Associations"); Comments of the National Association of Broadcasters (November 1, 2004) (hereinafter "NAB"); Comments of the New Mexico Broadcasters Association at 3 (November 1, 2004) (hereinafter "NMBA"); Comments of Nexstar Broadcasting, Inc. (November 1, 2004); Comments of the North Carolina Association of Broadcasters (November 1, 2004) (including testimonials from the state's Governor and Attorney General); Washington State Association of Broadcasters (November 1, 2004) (hereinafter "WSAB").

Like the Commission, these commenters concur that many different types of programming, including that which is not specifically targeted to the local community, serves and benefits the community.⁷ Further, these commenters point out the significant extent to which the First Amendment, case law, and the Commission's own precedent constrain regulatory activity in this area.⁸

Broadcasters and broadcast associations also agree that, in evaluating a broadcast station's service to its community, the Commission should expand its focus from programming to include other efforts, such as participation in community activities and sponsorship of local activities.⁹ This more expansive approach is particularly appropriate in light of the direct competition that broadcast stations face from other media and communications outlets, including cable systems, satellite services, and the Internet.

The record is replete with evidence that documents broadcasters' distinguished record of service to their communities.¹⁰ The record evidence confirms that broadcast stations, which are

⁷ See e.g., Comments of the Arizona Broadcasters Association *et al.* 4 (November 1, 2004) (hereinafter "AZ-BA"); Comments of Community Broadcasters Association at 4-5 (November 1, 2004) (hereinafter "CCBA"); Comments of Joint Broadcasters at 2, 6 (November 1, 2004).

⁸ See e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 651 (1994) ("[O]ur cases have recognized that Government regulation over the content of program broadcasting must be narrow, and that broadcast licensees must retain abundant discretion over programming choices.").

⁹ See e.g., Comments of AZ-BA at 3-4; Comments of Joint Broadcasters at 7-8 (November 1, 2004).

¹⁰ See generally Comments of the Alaska Broadcasters Association (November 1, 2004) (hereinafter "AL-BA"); CCBA; Citadel; Comments of Delmarva Broadcasting Company (November 1, 2004); Comments of Joint Broadcasters (November 1, 2004); Comments of Mississippi Association of Broadcasters (November 1, 2004); Comments of Named State Broadcasters Associations (November 1, 2004) (hereinafter "Named Associations"); Comments of the National Association of Broadcasters (November 1, 2004) (hereinafter "NAB"); Comments of the New Mexico Broadcasters Association at 3 (November 1, 2004) (hereinafter "NMBA"); Comments of Nexstar Broadcasting, Inc. (November 1, 2004); Comments of the North Carolina Association of Broadcasters (November 1, 2004) (including testimonials from the

accountable to both the Commission and the communities in which they operate, are best situated to identify community needs and desires and to respond promptly to them. A deregulatory environment only enhances this responsiveness.

As broadcast stations and their associations observe, competition and market forces generate significant economic incentives that ensure broadcast stations are responsive to the needs and interests of the communities in which they operate.¹¹ The Commission, which has a long history of deregulating communications markets, clearly understands that markets both reward and punish. Those licensees that are responsive to their communities' interests and needs tend to thrive; those that disregard those interests and needs tend to fail. The record compiled to date demonstrates that, for the vast majority of broadcast stations, market forces are successful in guaranteeing that broadcasters fully comply with or even exceed their localism obligations.¹² For these stations, new regulation to "promote" localism would be counterproductive. New regulation would both limit the ways in which a station might respond to a community's unique needs and interests and impose additional requirements and paperwork that would necessarily detract from local programming and community involvement.

The record also establishes that new regulation is not necessary to address the handful of broadcast stations that appear to be triggering public concern. A station that is non-responsive to the community in which it operates is subject to the Commission's complaint process; further, it places its license in potential jeopardy. It is undisputed that the Communications Act of 1934, as amended (the "Act") and current Commission rules and procedures vest the Commission with

state's Governor and Attorney General); Washington State Association of Broadcasters (November 1, 2004) (hereinafter "WSAB").

¹¹ See e.g., Comments of AL-BA at 4; Comments of Delmarva Broadcasting Co. at 2; Comments of NMBA at 3; Comments of MAB at 5.

¹² See *supra* note 9 and accompanying text.

substantial authority to meaningfully discipline such stations on an as-needed basis. Thus, rather than re-regulate an entire industry, the more appropriate Commission response to instances of broadcaster non-responsiveness is to deal with offending stations on a case-by-case basis.

As the Commission concluded when it instituted its deregulatory policies for radio and television, market forces provide sufficient incentives for broadcasters to air community-responsive programming. The record compiled in response to the NOI demonstrates the continuing validity of those conclusions. Market incentives are operating as intended to guarantee that broadcasters serve the needs and interests of their communities.

2. Broadcasters are striking the right balance in providing political coverage.

Not surprisingly, certain commenters are dissatisfied with the results of a market-oriented regulatory approach. Contending that competition leads inexorably to a misinformed electorate, several advocacy organizations urge the Commission to impose new content regulations and overhaul existing regulatory requirements to help foster political discourse. Neither the facts nor the law support their arguments. The current communications environment, which includes but is not confined to broadcast services, already provides the vigorous forum for democratic discourse that these parties seek.

Lamenting "[h]ypercommercialism in the media has swamped civic discourse," the Brennan Center for Justice and Consumer Federation of America *et al.* (hereinafter "BCJ/CFA") urge a major restructuring of broadcast regulatory policy.¹³ In their joint comments, CFA and the Consumers Union (hereinafter "CFA/CU") concur in the need for sweeping change, based largely on their presumption that economic incentives and market forces are inadequate to ensure

¹³ Comments of the Brennan Center for Justice and Consumer Federation *et al.* at iv-v (November 1, 2004) (hereinafter "BCJ/CFA").

diversity.¹⁴ The "major shift in broadcast policy" these parties advocate would establish as the Commission's primary regulatory goal "the widest possible empowerment of speakers."¹⁵

To achieve the diversity and empowerment they envision, BCJ/CFA and CFA/CU propose a multi-pronged restructuring of the broadcast industry premised, essentially, on the renunciation of commercial broadcasting. From these parties' perspective, the nation's long-standing broadcasting system, which is "dominated" by commercial licensees, is incapable of providing diverse local political and cultural programming and sufficient opportunities for local self-expression.¹⁶ Restructuring is necessary and appropriate, they believe, because "citizens' needs for democratic discourse should take precedence over the commercial marketplace of the mass media."¹⁷ Observing that the "empowerment of speakers . . . has little to do with the economics of the commercial mass media,"¹⁸ these parties urge, *inter alia*, that licenses and spectrum be recovered from commercial broadcasters and assigned to nonprofit, independent media and that remaining commercial broadcasters be required to provide airtime and facilities to nonprofit, independent media.

The Campaign Legal Center and the Alliance for Better Campaigns (hereinafter "CLC/ABC") advocate a similar but less ambitious goal of expanding political coverage. Characterizing current political coverage as "minimal and declining," CLC/ABC recommend that

¹⁴ Comments of Consumer Federation of America and Consumers Union at 2 (November 1, 2004) (hereinafter "CFA/CU").

¹⁵ Comments of CFA/CU at 4.

¹⁶ Comments of BCJ/CFA at 20.

¹⁷ Comments of CFA/CU at 3.

¹⁸ *Id.* at 4.

the Commission establish a quantitative standard to foster and promote "political discourse."¹⁹ To further this objective, CLC/ABC request that the Commission revise a number of its rules;²⁰ they also propose an overhaul of the license renewal process, including the addition of an interim review and the establishment of "predictable and measurable standards [that] will enable the FCC to make [renewal] judgments based on more objective information."²¹

Although CFA concedes that "educated citizens today have access to much more information . . . than they did twenty-five years ago,"²² each of these parties seriously and erroneously discounts the wealth of information and avenues for discourse available to Americans today. In addition to multiple broadcast stations, daily newspapers, and magazines, citizens have access to cable systems, satellite radio and video providers, and the Internet, including websites, web-logs and chat rooms.²³ These various media options provide both virtually unlimited information and meaningful opportunities for political debate and discourse. That the current state of political discussion displeases certain advocacy groups is not grounds for mandating that broadcast stations transmit even more political programming.

¹⁹ Comments of Campaign Legal Center and Alliance for Better Campaigns at 2 (November 1, 2004) (hereinafter "CLC/ABC").

²⁰ CLC/ABC recommendations include a proposal to increase and revise disclosure requirements applicable to political advertisements and public service announcements ("PSAs") and a request that the Commission "clarify" its lowest unit charge ("LCU") regulations.

²¹ Comments of CLC/ABC at 8.

²² Comments of CFA/CU at 5.

²³ See e.g., Comments of Citadel at 3; Comments of the Cromwell Group at 3 (November 1, 2004); Comments of NAB at i.

A majority of Americans appear pleased with the news and political coverage provided by broadcasters.²⁴ According to a 2003 study provided by the Radio-Television News Directors Association ("RTNDA"), over 70 percent of Americans believe that local television news serves "as a watchdog looking over local government."²⁵ More than seven in ten say that political news coverage on broadcast television is "good or excellent."²⁶ These numbers are not surprising. As numerous commenters observe, competitive alternatives create substantial incentives that ensure broadcasters promptly identify and respond to the needs and desires of the communities in which they operate.

While the advocacy organizations may bemoan that, during the recent elections, "a majority of the public was either misinformed or unaware of the basic planks of the presidential candidates' platforms,"²⁷ this public failing cannot be attributed to the broadcast industry, which is already offering substantial political coverage.²⁸ Indeed, this past June, every radio and television broadcast station in Montana - even small, locally-owned stations such as KTNV-FM and KLCB-AM - carried coverage of the state's gubernatorial debate. In fact, the record reveals that the audience would prefer *less* political coverage. According to the Wirthlin Worldwide poll (released October 29, 2004), 42% of voters believe that local broadcasters provided "too much

²⁴ The comments suggest a consensus that more voters turn to television than any other source for their election news. *See e.g.*, Comments of CLC/ABC at 2; Comments of the Radio-Television News Directors Association at 3 (November 1, 2004) (hereinafter "RTNDA").

²⁵ Comments of RTNDA at 3-4; *see also* RTNDA Exhibit A.

²⁶ *Id.*

²⁷ Comments of CLC/ABC at 2; *see also* Comments of CFA/CU, Attachment B.

²⁸ Numerous commenting broadcast stations and associations detail their political coverage. *See e.g.*, Comments of Joint Broadcasters at 3-4; Comments of the various Journal Broadcast Groups, including Journal Broadcast Group, Boise Radio Operations at 3 (November 1, 2004); Comments of WSAB at 13-15.

time" covering the elections.²⁹ Forty-seven percent say that local stations are providing "about the right amount" of coverage, while only 10% of voters think broadcasters are providing "too little time" covering elections.³⁰ If only one in ten audience members is interested in viewing additional political coverage, a requirement that broadcast stations air more political programming likely will drive the remaining nine away. Ultimately, local television stations can no more make their audiences watch programs (and retain information) than they can make candidates accept free air-time.³¹

3. In allocating airtime, broadcasters must be responsive to the community, not individual interests.

A second group of commenters seek to advance personal agendas, not social agendas. These parties seek access to broadcast stations for the purposes of obtaining an outlet for their material, be it artistic, religious, educational or commercial. The record demonstrates that broadcast stations will allocate air-time to this material when local communities demonstrate their interest and support in it. No public good is achieved, however, by requiring broadcast stations to air material or programs that are not responsive to community interests and lack public support.

This second group is largely comprised of professional musicians, performers, and promoters, represented by parties such as the American Federation of Television and Radio Artists and the American Federation of Musicians, which filed comments jointly (hereinafter "AFTRA/AFM") and the National Academy of Recording Arts and Sciences, Inc. ("NARAS").

²⁹ See Comments of NAB at 50.

³⁰ *Id.*

³¹ See *e.g.*, Comments of NAB at 48-50, discussing and documenting political candidates' refusal of free air time; Comments of WSAB at 16.

These parties assert that the broadcast industry is in "crisis;"³² that localism concerns are inseparable from the consolidation in media ownership;³³ and that this consolidation is driving the broadcast industry towards a "centralized, homogenized and uniform programming."³⁴ Cloaking their concerns in the mantle of localism, they contend that the only appropriate response to the resistance or obstacles they face is a regulatory fix.

Also falling within this group are various professionals and nonprofit organizations involved in the production and airing of public, educational and government ("PEG") programming. Although PEG programming is currently carried only by cable systems and by operators of open video systems ("OVS"), both the Alliance for Community Media and Alliance for Community Media - Western Region (hereinafter collectively referred to as "ACM") urge the Commission to expand PEG programming requirements to broadcast, satellite and IP-enabled media.³⁵ ACM echoes many of the concerns raised by AFTRA/AFM and NARAS, particularly with respect to media consolidation.

AFTRA/AFM and NARAS discuss the difficulty their members encounter in obtaining access to commercial broadcast facilities, but offer no evidence that audiences are in fact interested in listening to the music that their members have created or would support its airing.³⁶ AFTRA/AFM and NARAS merely assume that audiences listening to local commercial

³² Comments of American Federation of Television and Radio Artists and the American Federation of Musicians at 5 (November 1, 2004) (hereinafter "AFTRA/AFM").

³³ Comments of AFTRA/AFM at 4; Comments of National Academy of Recording Arts and Sciences, Inc. at 6-7 (November 1, 2004) (hereinafter "NARAS").

³⁴ Comments of AFTRA/AFM at 4; *see also* Comments of NARAS at 1-3.

³⁵ Comments of Alliance for Community Media at 2 (November 1, 2004) and Comments of Alliance for Community Media - Western Region at 2 (November 1, 2004) (hereinafter collectively "ACM").

³⁶ Other broadcast outlets available to local musicians and performers include public radio and television, noncommercial stations, and low power FM ("LPFM") stations. Neither

broadcast stations want this product (which may be "local" in some geographic capacity only, if at all). NAB, however, cites several studies that refute both this assumption and the corresponding assumption that audiences are ill-served by commercial broadcasters. Studies by the Edison Media Research and Arbitron (July 2002), the Mellman Group (December 2002), and Zogby International (October 2003) all demonstrate "solid appreciation among the American public" for the radio offerings available to them.³⁷

Despite the apparent frustration of AFTRA/AFM and NARAS members, it appears that most audience members are satisfied with the mix of formats and content being broadcast on commercial stations today. As the initial comments in this proceeding have made clear, it is a business imperative for broadcasters to be responsive to their communities; thus, if a local station's audience wants and supports programs that broadcast the work of musicians from the area, then the stations will respond.³⁸ If the audience is not interested, government fiat cannot make that audience listen - assuming *arguendo* that such fiat is even permissible under the Constitution.

AFTRA/AFM and NARAS seek access to obtain air-play and exposure for their members. The access ACM seeks goes far beyond this. ACM would have the Commission pursue a type of third-party access which, because it is dependent on dedicated facilities and

AFTRA/AFM nor NARAS discuss the adequacy of these alternatives. Similarly, the United States Conference of Catholic Bishops ("USCCB") complains that broadcasters "are more interested in commercial gain than in serving their communities' interest in religious matters." Comments of USCCB at 1 (November 1, 2004). However, the flood of emails from appreciative K-LOVE listeners demonstrates that the broadcast industry, which includes commercial, non-commercial and public stations, is devising new and innovative ways to successfully address religious interests and matters.

³⁷ Comments of NAB at 56-57.

³⁸ See e.g., Comments of Joint Broadcasters at 4; Comments of NAB at 56. Further, broadcast stations recognize their duty to respond to a "strongly expressed need" by a segment of their communities of license. See *Radio Deregulation Order*, *supra* note 4, at ¶ 63.

multi-channel operations, is fundamentally incompatible with broadcast media. Congress recognized this incompatibility - and the First Amendment concerns raised by access issues generally - when it enacted the PEG provisions in 1984:

One of the greatest challenges over the years in establishing communications policy has been assuring access to the electronic media by people other than the licensees or owners of those media. The development of cable television, with its abundance of channels, can provide the public and program providers the meaningful access that, up until now, has been difficult to obtain. A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public - the fundamental goal of the First Amendment - without the need to regulate the content of programming provided over cable.³⁹

Since then, Congress has extended PEG requirements only to OVS operators;⁴⁰ they have never been imposed upon the broadcast industry.

4. "Reform" advocates are silent on threshold issues, including questions of legality and Commission authority.

Significantly, none of the commenters calling for regulatory change appear to address fundamental threshold issues, such as explaining how their recommendations could be accomplished pursuant to controlling law or whether, in light of specific statutory provisions, recommended Commission action would be appropriate or permissible. Their silence should be construed as implicit concessions that their proposals are legally untenable.

AFTRA/AFM and NARAS, for example, call for regulatory reforms but, notably, neither set of comments addresses the myriad of legal and policy issues their recommendations raise. There is no discussion of the First Amendment implications of their similar proposals to quantify and regulate content nor, despite explicit Commission request, is there any discussion regarding

³⁹ H. R. Rep. No. 98-934, *reprinted in* 1984 U.S.C.A.N.N. 4655, 4667; *see* 47 U.S.C. § 531(b).

⁴⁰ *See* 47 U.S.C. § 531(b).

the scope of the Commission's authority to regulate in areas such as payola-type practices and voice-tracking.⁴¹

The comments of ACM and ACM-WR are devoid of any discussion regarding the lawfulness of imposing PEG programming requirements, including funding obligations, on broadcast stations. At the very least, the ACM parties should have acknowledged that the Act imposes PEG obligations upon cable and OVS providers only.

BCJ/CFA and CFA/CU propose to "balance" the broadcast industry by, *inter alia*, denying license renewals for commercial broadcasters and handing those licenses to nonprofit, independent media. Had these parties intended their proposed restructuring of the broadcast industry as a meaningful and viable option for Commission consideration, then surely they would have attempted to explain how that restructuring - including the significantly altered public interest standard applicable to renewals upon which it would be based - could be reconciled with the Constitution and the Act, as well as decades of Commission precedent and case law. They make no such effort. Nor do they attempt to reconcile their expansive "empowerment" proposal with the Commission's long-standing recognition that "balanced programming does not necessarily require that a station attempt to provide service to all segments of the community...."⁴²

CLC/ABC's comments are similarly silent with respect to the constitutional and statutory issues its proposals raise. For example, CLC/ABC chooses to sidestep the First Amendment ramifications of its proposed "quantitative standard" applicable to political discourse, even though the NOI notes the Commission's sensitivity to the First Amendment concerns inherent in

⁴¹ See NOI at ¶¶ 35, 38.

⁴² NOI at ¶ 24.

any form of content regulation.⁴³ And, although CLC/ABC states that the Commission "currently has the authority to add an interim review" to the license renewal process,⁴⁴ it neither provides a supporting citation nor discusses the substantial statutory limitations on Commission discretion in this area.

As a number of commenters observed, before the Commission may depart from its former views and re-regulate in this area for the purpose of achieving its localism policy goals, it must provide a reasoned analysis, consistent with that described by the Supreme Court in *State Farm*.⁴⁵ It is noteworthy that those who urge the Commission to depart from its deregulatory policies appear unable or unwilling to assist the Commission in this task by offering even a cursory legal analysis to support their recommendations.

5. The Commission lacks authority to modify the license renewal process.

As the Commission points out, the renewal process was substantially deregulated in the 1980s, turning from active review to a more passive role based on petitions to deny and license certifications. Congress not only concurred with this approach, it further deregulated the process in 1996 when, in enacting the Telecommunications Act of 1996 (the "1996 Act"), it eliminated the comparative renewal process, extended the license renewal term to eight years, established a presumption of renewal if a licensee has served the "public interest, convenience and necessity," and has not committed any violations of the Commission's rules, and prohibited competitor consideration.⁴⁶

⁴³ NOI at ¶ 12.

⁴⁴ Comments of CLC/ABC at 8.

⁴⁵ *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) ("*State Farm*").

⁴⁶ 47 U.S.C. § 309(k).

It is axiomatic that the Commission may act only pursuant to the authority that Congress has delegated to it. "An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress."⁴⁷ When Congress has chosen to occupy a field, as it has done with respect to license renewals in Section 309(k), the Commission exceeds its delegated authority if it acts to "strengthen" the process beyond that which Congress provided, as numerous parties urge and the Commission itself considers.⁴⁸ Thus, the Commission may not institute an interim review, as CLC/ABC requests, because Section 309(k) neither contemplates nor authorizes an interim review process. Settled principles of statutory construction provide, *inter alia*, that the specific prevails over the general, and the later-enacted provision prevails over the earlier-enacted provision.⁴⁹ Moreover, the Commission may not deem such action permissible because Congress did not expressly foreclose the possibility.⁵⁰

Nor may the Commission fashion and apply a new "public interest" standard, as several parties either explicitly or implicitly urge, in an attempted end-run around the deregulation Congress has mandated. Under the doctrine of ratification, when Congress uses a term such as "public interest" in Section 309(k)(1), it is presumed to intend the meaning of that term or phrase

⁴⁷ *Motion Picture Ass'n of America, Inc., et al. v. FCC and United States*, 27 CR 1305, 309 F.3d 796 (2002) ("MPAA ") ("The FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue.").

⁴⁸ NOI at ¶ 42.

⁴⁹ See e.g., *Stendor Enterprises Ltd. v. Armtex, Inc.*, 947 F.2d 727,732 (4th Cir. 1991); *Redhouse v. C.I.R.*, 728 F.2d 1249, 1253 (9th Cir. 1984); *Mesa Petroleum Co. v. FERC*, 688 F.2d 1014, 1016 (5th Cir. 1982).

⁵⁰ *Id.* The MPAA court found this to be "an entirely untenable position," citing in support a long string of cases, including *Ry. Labor Executives*, 29 F.3d at 671 ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely with the Constitution as well.").

as it has been interpreted by agencies or courts.⁵¹ In implementing Section 309(k), the Commission properly adhered to this doctrine, observing that "[i]t is our present intent to continue to apply existing policy statements and case law, refining these as appropriate on a case-by-case basis, in interpreting the statutory terms that govern the new renewal process."⁵² While the Commission may clarify those terms, it may not alter their established meaning as of the date of enactment.

In clarifying the Act in this instance, the Commission is entitled to deference only if it acts in accordance with its precedent or offers a reasonable explanation for the change. Under the familiar *Chevron* two-step test, the courts will defer to the Commission unless Congress has spoken to the precise question at issue (*Chevron* step one) or the Commission's interpretation is unreasonable (*Chevron* step two).⁵³ In determining whether an agency's statutory construction is "permissible" under the second prong of *Chevron*, a court must consider whether the agency has been consistent in its interpretation of the statute.⁵⁴ The courts require that an agency square its construction of a statutory term or directive with its prior pronouncements; failure to do so, absent reasonable explanation, warrants remand or reversal.

⁵¹ See, e.g., *Society of Plastics Indus., Inc. v. ICC*, 955 F.2d 722, 728-29 (D.C. Cir. 1992) (in interpreting the meaning of the term "joint rate" within the Interstate Commerce Act, the court set forth the doctrine of ratification which holds that "when Congress reenacts, without change, statutory terms that have been given a consistent judicial or administrative interpretation, Congress has expressed an intention to adopt that interpretation").

⁵² *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, 2 CR 1238, 11 FCC Rcd. 6363, ¶ 5 (1996).

⁵³ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S Ct 2778, 81 L Ed 2d 694 (1984).

⁵⁴ *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 108 S. Ct. 413, 421, n.20, 98 L. Ed. 2d 429 (1987).

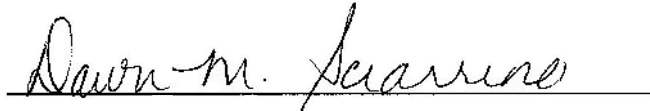
In this case, certain commenting parties admittedly seek a "major shift" in policy as well as process but they do not offer, nor does the record contain, any reasonable basis for the substantial deviations from precedent they seek. In fact, the record documents widespread community-responsive broadcaster service and corresponding audience satisfaction, thereby supporting a continuation of the deregulatory policies instituted by the Commission two decades ago. This record, in conjunction with the deregulatory directives articulated by Congress in the 1996 Act, requires that the Commission reject the calls of those seeking to promote their own social or personal agendas and, instead, maintain its present course.

Conclusion

WHEREFORE, the Commission should take no further action in response to its Notice of Inquiry. The record in this proceeding demonstrates that its current deregulatory approach, which is consistent with Congress' vision and mandate, is sufficient to foster localism and achieve public policy goals.

Respectfully submitted,

MONTANA BROADCASTERS ASSOCIATION

A handwritten signature in cursive script, reading "Dawn M. Sciarrino", is written over a horizontal line.

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Attachment A
Montana Broadcasters Association
Community Service Examples

KXLO / KLCM – Lewistown, Montana carries 17 live, local newscasts a day. They also carry a 50 minute live, local public affairs program and several daily farm, livestock reports. Sundown Saunters is a locally produced radio drama that airs twice weekly. The stations also participate in Relay for Life, Angel Tree for Senior Citizens, Red Cross drives, and cover school board meetings and city council meetings. Like most Montana radio stations they also are the voice of the local high school athletic teams

KDBM / KBEV, Dillon, Montana recently raised \$80,000 for the local YMCA. In addition to the regularly scheduled local newscasts, the stations air a local public affairs program, “What’s On Your Mind,” on a weekly basis. Every Wednesday morning, the stations air a half hour local program with the 4-H kids. On Monday and Friday mornings, the public affairs program features local college students. The stations annually hold a School Supply drive to raise funds and get donations of school supplies for families that cannot afford them. For the last eight years, KDBM / KBEV held a Coats for Kids drive and annually distribute more than 400 coats to needy children. The stations collect the coats, pay to have them professionally cleaned and use local charities to distribute them. As the stations like to say, usually just among themselves because they don’t do this for publicity and in fact rarely even talk about it, ‘no child or adult in Beaverhead County will go without a warm winter coat.’”

KTVQ-TV in Billings, Montana responded to a shortfall in the public school budget by “adopting” a class each week and providing \$1000 in books and supplies to the class. They also started their own scholarship program and award three scholarships to local students attending college each year.

KECI-TV in Missoula, Montana produces two and one-half hours of live, local news each day. They also produce the “Montana Academic Challenge,” a weekly program featuring high school students from around the state in an academic game of knowledge. The station provides more than \$75,000 in scholarships to participating schools.

KPAX-TV, also in Missoula, Montana airs, in addition to its two and one-half hours of live, local news program daily, two weekly half-hour public affairs programs. One program is traditional news/talk and the other is a fully produced location based feature program.

The Cherry Creek Radio stations in Helena, Montana must be on everyone’s list. These stations raised money for a new van for the local youth home and adopted the “Old MacDonald Farm,” a working production farm that teaches and employs the developmentally disabled who run the farm and sell its merchandise to local restaurants and grocers. Working with the farm’s founder, they helped to establish a sister operation in Kurgistan. The stations also carried every single political debate held in their coverage area during the last election.

12 Stations; 12 Hours. Two years ago, the 12 commercial radio stations in Missoula started a program called 12 Stations; 12 Hours. For an entire day, all 12 stations forego all regular programming and devote the day to raising money and awareness for a local charity. The first year they devoted the day to the Poverello Center, a soup kitchen and shelter for the homeless. Each station hosted Poverello board members and broadcast special features about the program and beneficiaries of the charity at regular intervals. No one tries to “one-up” anyone else, the sole goal was to raise enough money to keep this worthwhile local charity in business. They succeeded. Last year it was the Ronald McDonald House, which will break ground in the spring of 2005. Again, the sole goal of the project is to benefit the local community.

KAAR / KMBR / KXTL in Butte, Montana took it upon themselves when vandals broke in and nearly destroyed the local American Legion Hall to raise both money and awareness to get the building back open. The station employees led the work parties and the station raised all of the funds to repair the building to “better than before” the vandalism.

KBOW / KOPR in Butte, Montana raised over \$7,000 in donations a in matter of days just before Thanksgiving to replace all of the food which spoiled when the local rescue mission’s freezers were discovered unplugged. Not only did the stations go on the air with the rescue mission’s story, they solicited the donations and the staff volunteered to cook and serve the Thanksgiving meal to over 1300 needy people. The money raised, nearly double what was needed to replace the Thanksgiving food, also helped fund Christmas food baskets for 130 needy households.

KAAR / KMBR / KXTL and KBOW / KOPR in Butte, Montana joined forces for a one day fundraiser to solicit funds for a local fire house that needed a rapid response truck. All five stations licensed to Butte promoted the fundraiser for a period of two months and in the one day fundraiser raised approximately \$40,000. The truck was needed by the local fire department, which had only one fire truck, to transport a new fire training trailer to schools and other community events to teach children fire safety. All totaled the Butte stations raised enough money (\$60,000) for the fire department to purchase and equip a new rapid response truck that is used for the fire training trailer and as a first responder vehicle – by jointly promoting and using joint remotes on the day of the fundraiser with the fire department.

KSEN / KZIN in Shelby, Montana often pre-empt regular programming for all-day specials on the local economy and, as a border town, US-Canadian trade relations. Last year the stations carried two solid days of coverage of trade meetings concerning both timber and grain trade with Canada, and invited the US Secretary of Agriculture to the town to participate as well as his Canadian counterpart.

KLCB / KTNV, Libby, Montana carries the local city council meetings as well as numerous special programs. Libby is an EPA Superfund site. When hearings were held to discuss health and environmental issues affecting the community, KLCB / KTNV

suspended all regular programming for two days to carry every public meeting, including interviews with the EPA Administrator, both Montana's US Senators, the Governor and numerous local officials and members of the public.

Local broadcasters know and understand their communities. There is plenty of competition from other broadcasters, newspapers, cable and satellite radio and television to insure that local broadcasters honor their commitment to the communities where they live and serve. Even the stations that are owned by out of state interests are operated by long-time Montanans that know their communities of license. Should they fail to serve that community the laws of economics will prevail and they will fail. That is not why they do all of the local programming and public service that they do. They do it because these are their communities. They live here. These are their neighbors. More often than not they do not even need to be asked. They see a problem and they address it. Cable does not. Satellite radio and television do not. The internet does not. More and more the local newspaper monopoly does not.

We are proud of our broadcasters here in Montana. The local communities know that they are stakeholders in the local stations and the owners and operators of those stations honor their commitment to their communities.